MOTION FILED
DEC - 6 1993

No. 93–723

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

X–CITEMENT VIDEO INC.,
AND RUBIN GOTTESMAN,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL FAMILY LEGAL FOUNDATION AND AMERICAN FAMILY ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

*LEN L. MUNSIL
JAMES P. MUELLER
5353 N. 16th Street, Suite 400
Phoenix, Arizona 85016
(602) 265–1513

*Counsel of Record
Amici Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....ii

MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE..... 1

INTEREST OF AMICI CURIAE..... 3

INTRODUCTION..... 5

ARGUMENT..... 6

CONCLUSION.....15

CERTIFICATE OF SERVICE.....17

TABLE OF AUTHORITIES

PAGE

Edward D. DeBartolo Corp. v. Florida Gulf Coast Bldg & Construction Trades Council
485 U.S. 568 (1988).....11

FW/PBS Inc. v. Dallas
493 U.S. 215 (1990).....12

Ginzburg v. United States
383 U.S. 463 (1966).....12

Globe Newspaper v. Superior Court
457 U.S. 596 (1982).....7,8

Hamling v. United States
418 U.S. 87 (1974).....12,13, 14

Miller v. California
418 U.S. 87 (1973).....12

New York v. Ferber
458 U.S. 747 (1982).....7

Osborne v. Ohio
495 U.S. 103 (1990).....8,11

United States v. Knox
cert. granted 113 S.Ct. 2926 (1993), *vacated and remanded*, ___ U.S. ___ (1993).....3,9, 15,16

United States v. X–Citement Video
982 F.2d 1285 (1992).....11,13

Statutes

18 U.S.C. § 2252.....5,10

Other Authorities

H.Rep.No. 536 (1983).....6

S.Rep.No. 438 (1977).....7

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Amici respectfully move this Court for leave to file a brief amici curiae in support of the petition for writ of certiorari. The petitioner has consented in writing to our filing this brief (see Appendix A), but counsel for respondent did not respond to our written and telephonic requests for consent.

Amici each have a long-standing interest in and commitment to the governmental effort to eliminate child pornography, and have specific expertise in this area of law (see Interest of the Amici Curiae, *supra*). These organizations have more than a million supporters who are concerned about the effort to protect our children from sexual exploitation. Further, amici's legal interpretation of the statute at issue is not represented by either party, and so will provide a unique perspective to the Court.

For all these reasons, amici request that this Court grant our motion for leave to file a brief amici curiae.

Respectfully submitted,

LEN L. MUNSIL
5353 N. 16th Street
Suite 400
Phoenix, Arizona 85016
(602) 265-1513

INTEREST OF THE AMICI CURIAE

National Family Legal Foundation (NFLF) is a nonprofit, public interest corporation that seeks to preserve the integrity of families and the innocence of children by promoting a healthy and safe environment, free from illegal pornography and the sexual crimes which invariably accompany its widespread distribution. NFLF provides free legal assistance to prosecutors enforcing child pornography and obscenity laws, and helps draft laws and ordinances for concerned public officials to help lessen the negative influence of pornography on society.

NFLF has appeared as amicus curiae before this Court in every child pornography and obscenity case since NFLF's inception in 1990, including the recent child pornography case of *United States v. Knox*. NFLF board members Edwin Meese, former Attorney General of the United States, and Alan Sears, former executive director of the Attorney General's Commission on Pornography, have

a longstanding commitment to aggressive enforcement of federal child pornography laws. NFLF is supported by citizens in all 50 states.

Amici American Family Association (AFA) is a nonprofit organization incorporated in 1977 under the name National Federation for Decency. AFA coordinates citizen and church participation to promote traditional American values and apply the Biblical ethic in society. AFA has supporters in all 50 states, including more than 600 chapters of local citizens who actively seek to preserve community integrity through enforcement of child pornography and obscenity laws. About one million individuals and churches subscribe to its montnly newsletter, *AFA Journal*.

INTRODUCTION

Protecting children from sexual exploitation is a governmental interest of surpassing importance. The statute at issue, 18 U.S.C. § 2252, has been employed successfully by federal prosecutors for more than 15 years to prosecute those who traffic in child pornography. The statute has withstood numerous court challenges. But if the Ninth Circuit's decision is correct, § 2252 has suffered all this time from a fatal constitutional defect that no other court was able to discover. We believe strongly that the court of appeals failed to accord Congress the deference it is due by refusing to construe this vital statute in a constitutional manner. The decision of the court of appeals conflicts with decisions of this Court and other federal courts, and most importantly, will cripple the important federal effort to eliminate child pornography. This Court should therefore grant certiorari and reverse the court of appeals.

ARGUMENT

Federal statutes prohibiting the sexual exploitation of children through the production of pornography — as distinct from federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. They reflect a concern that "[e]ach year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H.Rep.No. 536, 98th Cong., 1st Sess., (Nov. 10, 1983), reprinted in 1984 U.S. Code Cong. & Admin. News, 492.

Congress recognized that the distribution and receipt of child pornography contributes to further incidents of child abuse:

> [M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish

> contact with other pedophiles, and even to establish liaisons with some of the child models.

S.Rep.No. 438, 95th Cong., 2d Sess., at 5 (1977), reprinted in 1978 U.S. Code Cong. and Admin. News, 43.

This Court recognized the substantial governmental interest in protecting children from the evils of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982). In an opinion by Justice White, the Court upheld a New York statute which prohibited the distribution of materials which depict children engaging in sexually explicit conduct whether or not such depictions are "obscene".

First, the Court found that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 756-57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607

(1982). Further, the Court went on to say:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759 (footnote omitted). The Court concluded, because of the compelling state interests involved, that child pornography, even though not obscene, was not protected by the First Amendment.

Finally, in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court approved a law prohibiting the possession of child pornography, even in one's own home. In upholding the statute, this Court further addressed the impact of this vile crime:

> Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain...[E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

The victimization of children through child pornography has been aided by two recent developments, one in technology and one in the law. First, advancements in computer technology and graphics have made it possible for pedophiles to instantaneously reproduce and distribute child pornography on a national and international basis through computer modems. Second, the Justice Department's recent reinterpretation of the definition of child pornography in the case of *United States v. Knox*, No. 92-1183, *cert. granted* 113 S.Ct. 2926 (June 7, 1993), *vacated and remanded*, ___ U.S. ___, 62 U.S.L.W. 3318 (Nov. 1, 1993), has opened the door -- if the courts go along -- to legalization of a whole category of child

pornography that was previously prosecutable. In that case, Congress specifically repudiated the Justice Department's new interpretation by a 100–0 Senate vote, but only after this Court remanded the case to be reconsidered in light of the Justice Department's new, weaker standard.

Given the strength of the government's interest in protecting children from sexual exploitation, and given the traditional reluctance of the judiciary to strike down an act of Congress as unconstitutional on its face, the court of appeals erred by failing to construct § 2252 in a constitutional manner. This crippling of the battle against child pornography can only be corrected if this Court grants certiorari and reverses the court of appeals.

While the effect of the court of appeals' decision is to undercut the important federal effort to eliminate child pornography, as a matter of law the ruling conflicts with previous decisions of this Court and other courts. The court's conclusion that § 2252 contains no scienter

requirement and cannot be narrowed judicially is just plain wrong. As Judge Kozinsky pointed out in his dissent, the majority ignored this Court's discussion in *Osborne* of the minimum constitutional scienter requirement for a child pornography conviction. In that case, this Court held that recklessness is constitutionally sufficient to uphold a child pornography conviction. 495 U.S. at 115. Further, courts have an obligation to determine whether constitutionally narrowing an act of Congress will cure its defect before taking the extreme step of invalidating the statute. *Edward D. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *U.S. v. X-Citement Video*, 982 F.2d 1285, 1295, n.6 (9th Cir. 1992) (Judge Kozinsky, dissenting in part).

The court of appeals should have grafted a constitutional requirement of recklessness onto the statute, thus saving it from facial invalidity. We believe that recklessness standard would be met when, as the

government argued below, the defendant had knowledge of the character and nature of the material, *Hamling v. United States*, 418 U.S. 87, 123 (1974); not that it met the legal definition of child pornography, but rather that it was sexually explicit and that the "actors" and "actresses" appeared youthful. It "demeans the grand conception of the First Amendment", *Miller v. California*, 413 U.S. 15, 34 (1973), to continually use the noble protections for freedom of speech afforded by that historic provision to examine in microscopic fashion the validity of convictions for those engaged in "the sordid business of pandering." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 258 (1990) (Justice Scalia, concurring and dissenting), quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966).

Rubin Gottesman not only was involved in "the sordid business of pandering" sexually explicit and probably obscene material, but the government clearly proved in this

case that he had actual knowledge that he was distributing child pornography. United States' brief at 2–4. But it should be enough to sustain a conviction in this case, and in any subsequent child pornography case, for the government to prove that a defendant recklessly trafficked in sexually explicit material involving youthful–appearing participants. Any further scienter requirement would decriminalize much child pornography, because every trader in pedophilic material involving postpubescent children would successfully argue that he had no idea how old the "performers" were. The court of appeals' says that requiring knowledge that at least one performer was underage is only a requirement of knowledge of a particular fact, not a requirement that the defendant know the material's legal status, in violation of *Hamling*. *U.S. v. X–Citement Video*, 982 F.2d at 1291. But this is doublespeak; if you require actual knowledge that one performer is underage, you are requiring actual knowledge of the material's legal status, because by

definition it is then child pornography. *Hamling* made clear that knowledge of the material's legal status was not necessary. 418 U.S. at 123.

CONCLUSION

The bottom line is this: Rubin Gottesman makes his living skirting obscenity laws, and like most pornographers was only too happy to satisfy a request for child pornography when the price was right. To people who make their living through commercial exploitation of the flesh of young girls, whether those girls are 11 and 12 as they were in the *Knox* case, or 15 as in this case, or 18 and 19 as they are in most obscenity cases, doesn't make a whole lot of difference. And if they don't care who they abuse and degrade to make a profit, we shouldn't go out of our way to construct legal arguments to let them off the hook.

Affirming the constitutional validity of convictions for hard–core pornographers who recklessly disseminate sexual material involving children will never interfere with the legitimate free speech rights of the American people. But while federal judges and the Solicitor General's office

play fun and challenging intellectual law school games with statutory and constitutional interpretation, in this case and in *Knox*, the sexual abuse of real children for profit continues. This Court should not allow another roadblock to be thrown up in the effort to prosecute despicable criminals who make their living from the sexual abuse of children. For all the foregoing reasons, it is vital that this Court grant the government's petition for a writ of certiorari, reverse the court of appeals, and reinstate the convictions of Rubin Gottesman and his corporation, X-Citement Video.

Respectfully submitted,

LEN L. MUNSIL
JAMES P. MUELLER
5353 N. 16th Street
Suite 400
Phoenix, Arizona 85016
(602) 265-1513

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amici Curiae National Family Legal Foundation and American Family Association In Support Of The Petition For Writ Of Certiorari" have been sent by U.S. Mail, Postage Prepaid, on this 6th day of December, 1993 to:

Drew S. Days III, Solicitor General
William C. Bryson, Deputy Solicitor General
Christopher J. Wright, Assistant to the Solicitor General
U.S. Department of Justice
Office of the Solicitor General
10th & Constitution Avenue, NW
Washington, D.C. 20530

Stanley Fleishman
Fleishman, Fisher & Moest
2049 Centry Park East
Suite 3160
Los Angeles, California 90067

LEN L. MUNSIL

APPENDIX A

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

December 3, 1993

Lan L. Munsil
Executive Director and
General Counsel
National Family Legal Foundation
5353 North 16th Street
Suite 400
Phoenix, Arizona 85016

Re: United States v. X-Citement Video, No. 93-723

Dear Mr. Munsil:

This is in response to your letter of December 3, 1993.

On behalf of the United States I hereby consent to the filing of a brief as amicus curiae on behalf of the National Family Legal Foundation and Family Research Council in the above case.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General